

Gag Orders and Handling the Media During Litigation

John A. Kaniewski

QUINLIVAN & KANIEWSKI LLP

6 Hutton Centre Drive, Suite 1150

South Coast Metro, California 92707

(714) 241-1919

J.Kaniewski@Quikanlaw.com

The Issues

- The Law: What you can and can't say about pending lawsuits.
- Gag Orders: Can you prevent the other side from talking?
- The Media: The desire for the 10-second sound bite.

The Rules of Professional Responsibility

- Rule 5-120. Trial Publicity
- (A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

The Rules of Professional Responsibility

- Rule 5-120. Trial Publicity (cont'd)
- (B) Notwithstanding paragraph (A), a member may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) the information contained in a public record;
 - (3) that an investigation of the matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest. . . .

The Rules of Professional Responsibility

- Rule 5-120. Trial Publicity (cont'd)
- (C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Factors to be Considered

- Whether an extrajudicial statement violates rule 5-120 depends on many factors, including:
- (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue;
- (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d);

Factors to be Considered

- Whether an extrajudicial statement violates rule 5-120 depends on many factors, including:
- (3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and
- (4) the timing of the statement.

Gag Orders

- The court's power, generally:
- Code of Civil Procedure Section 128(a)(5) provides that every court shall have the power to control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.

The Constitutionality of Gag Orders

- Limitations on a lawyer's free speech rights are constitutionally permissible where the lawyer's statements to the press or other media are "substantially likely to have a materially prejudicial effect" on the pending proceeding. Gentile v. State Bar of Nevada (1991) 501 U.S. 1030, 1076.

The Constitutionality of Gag Orders

- The basis for restricting lawyers' ability to speak out on issues involved in their cases is the State's interest in assuring fair trials. "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." Id., at 1075.

The Constitutionality of Gag Orders

- Prejudice to a party is presumed where a juror is exposed to a news report that contains any information "which would be at all likely to influence jurors" in arriving at a verdict.
Province v. Center for Women's Health & Family Birth (1993) 20 Cal.App.4th 1673, 1679.

Factors to be Considered by the Trial Court

- The courts have both an obligation and a duty to assure a fair trial by preventing release of potentially prejudicial publicity. Rosato v. Superior Court (1975) 51 Cal.App.3d 190, 223.

Factors to be Considered by the Trial Court

- Gag orders on trial participants are constitutionally permissible so long as:
 - (1) the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest;
 - (2) the order is narrowly tailored to protect that interest; and
 - (3) no less restrictive alternatives are available.
- Hurvitz v. Hoefflin (2000) 84 Cal.App.4th 1232, 1241.

Dealing with the Media

- General counsel must make the development of effective and realistic strategies for public and press relations a routine part of corporate litigation strategy.
- Lack of accessibility to the media may lead to one-sided reporting.
- An October 1998 study by Opinion Research Corp. found that 62% of Americans believe a company is guilty of wrongdoing when it responds with “no comment”.
- You don’t have much time. Be clear and concise.

Dealing with the Media - Recommendations

- Cooperate and be accessible.
- Retain a respected outside public relations professional for the litigation team.
- Lawyers should not give PR advice. PR professionals should not give legal advice.
- Rely on PR professionals to write the press releases, develop the message themes, identify likely allies, select appropriate spokespersons, and execute the publicity campaign.

Suggested Reading

- Marshall, Rose: “No Comment and Other Admissions of Guilt”, Briefly . . . Perspectives on Legislation, Regulation, and Litigation, National Legal Center for the Public Interest, Vol. 4, No. 2.
- Mitroff, Ian, et al.: The Essential Guide to Managing Corporate Crises, Oxford University Press, 1996.
- Harvard Business Review on Crisis Management, Harvard Business School Press, 2000.